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Employee Relations News

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Fully proficient in Industrial Relations, HR, Training & OH&S systems, Greg Reiffel offers an affordable solution to your HR/IR needs, call him now.

Greg has over 25 years' experience in Human Resource Management and Employee/Industrial Relations, with qualifications in IR and HR, Training & OH&S systems. EBA's, unfair dismissals and policies/employee handbooks are a speciality.

Experience includes peak employer bodies such as the VECCI and Civil Contractors Federation, NFP, Local Government, and manufacturing.

for further information, please see my LinkedIn profile:
https://www.linkedin.com/profile/view?id=122714661&trk=nav_responsive_tab_profile

Please note that my availability will be limited over the next couple of months, having just accepted an assignment for organisation transitioning to a central HR model.

In this edition

Hiring over 50's can come with a $10,000 government grant.

If you hire a worker who is 50 years of age or over and has been on income support for six months, the federal government will provide the company with a $10,000 grant through its "restart" program..

For more information to www.employment.gov.au/Restart.

Costs v benefits, the use of lawyers and paid agents in the Fair Work Commission

An AHRI blogger recently lamented the FWC's approach to allowing lawyers and paid agents to represent their client. For those of you who are more technically minded, this issue is covered in section 596 of the FWA 2009.

No problem if you are an employee of the party, a union or peak employer body – insofar that the employer/employee body's constitution allows such representation (see *Eland v Childrenfirst Inc t/a Childrenfirst [2014] FWC 3051 (8 May 2014)*.

There have been some 77 cases (including appeals) dealing with this jurisdictional matter. Statically, if you are a lawyer or paid agent you have a 75% chance of succeeding.

The key citations to rely upon appear to be:

- *Dr Cameron Christophers v Deanne Carr Dental Pty ltd T/A Envisage Dental studio [2014] FWC 791 (U2013/14548) COMMISSIONER SIMPSON. BRISBANE, 7 FEBRUARY 2014; and*
- *Mr Anthony Delloso v North Queensland X-Ray Services Pty Ltd T/A North Queensland X-Ray Services [2014] FWC 3064 (U2013/17530). COMMISSIONER SPENCER. BRISBANE, 2 JUNE 2014.*

Put in simple terms, it would appear that if the matter is complex (jurisdictional matters fall into this category) or it can be demonstrated that it would be more efficient (for the FWC) to have a lawyer or paid agent, then it is likely that permission shall be granted to appear.

By way of footnote, I can understand the reasoning for these restrictions given my witnessing of some appalling behaviours by some employee advocates and lawyers - either out of their jurisdictional comfort zone - or the No-win No-fee fraternity exploiting the system. However using a peak employer body can be expensive (about three times what I charge!) and lawyers tend to look for "legal" rather than "practical" outcomes. Remember, the current FWC has its foundations firmly set on an informal place in which to resolve employment issues.

In saying this, it has come to my attention that the FWC is providing a "pro-bono" program for jurisdictional matters. This provides one hour's free legal advice prior to a jurisdictional hearting. Further information: https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/eligibility-remedies-1

So what to do:

- *Use a peak body and pay the premium (membership plus consulting costs).*
- *Use a lawyer- but ensure that they specialise in employment law.*
- *Use a consultant, ensuring that they are specialists in employment law. This is the cheapest option (and often more effective, self-interest admitted).*
- *Overall, ensure that if using a lawyer or paid agent, that they have a written submission that they have familiarised you with and can be easily transferred into your hands.*
- *Another option is to employ the paid agent as a casual* employee. Problem solved (maybe).

Payment of annual leave of termination[1]

This matter has been widely reported, so I will be brief. Fundamentally the Federal court found on analysis of the prevailing EBA and past and present fair work acts, that:

> *"In my view, this lends support to the argument that s 90(2) (unlike s 90(1)) is not confined to a statement of a minimum obligation, but is a statement to the effect that an employee should not suffer a reduction in the value of unpaid annual leave if employment comes to an end while paid annual leave remains untaken."*

This decision obviously turns on the facts on the wording of an EBA in place; but taken at its narrowest interpretation, a departing worker should be paid out the annual leave at the rate they would have earned if they had continued working.

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[1] ***Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining & Energy Union* (No. 2) [2015] FCA 136**

Receipt of gifts end in termination of employment[2]

In a decision that bodes well for employers having promoted and enforced their policies, the applicant's receipt of gifts was found to be in breach of the company's gifts policy; leading to the applicant's summary dismissal.

The respondent has a Code of Ethics and Business Conduct. The applicant was given a copy of this policy when she commenced employment with the respondent. This policy includes the following:

> *'GIFTS AND ENTERTAINMENT*
> *Exchanging gifts with customers is a common way to express appreciation. However, gifts and entertainment should never be given in an attempt to influence business decisions -- even where it's a standard business practice or local custom. Always consult your local Gifts and Entertainment Policy before offering or accepting anything of value, including gifts, favours, tickets to entertainment events, invitations to travel etc.*
>
> *"The local gifts and entertainment policy for Australia includes the following:*
>
> *'The Company selects products and services on the basis of price, quality and service. The Company expects its customers to purchase its products and services on the same basis. All Company business transactions must be transparent, impartial, objective and free of outside influence. Directly or indirectly giving and/or receiving modest gifts, favours, entertainment, and hospitality is often appropriate, a cultural expectation, and used to strengthen business relationships. However, gifts, favours, entertainment, or hospitality may not be accepted or given if they violate any law or regulation industry code and/or Company Policy; are conditional; and/or obligate or appear to obligate the recipient or Company to provide an improper business advantage."*

The policy explicitly states that 'covered parties' must not offer, accept, or receive directly or indirectly a gift, favour, entertainment, or hospitality if it has a value in excess of $100 AUD.

> *"… a gift, favour, entertainment or hospitality that has a value greater than $100 AUD or the local equivalent of $100 AUD, or that could influence or be reasonably perceived influence the covered party's judgement must be immediately reported to Human Resources or the Company's VP - Compliance and General Counsel, and returned to the donor as tactfully as possible, or where returning the gifts is not possible or appropriate, the gift should be property donated to charity."*

In finding in favour of the respondent employer, the SDP decided:

> *It is not seriously in contention that the applicant was guilty of misconduct. She breached the respondent's policies governing the acceptance of gifts on two separate occasions. These policies are very clear, and the applicant had received recent training in them. The breaches were not minor or technical in nature. The policies themselves are clearly important to the respondent and are lawful and reasonable. In particular the restrictions placed on the receipt of valuable gifts by the respondent's employees are designed to ensure that the respondent's business dealings are 'transparent, impartial, objective and free of outside influence.*

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[2] ***Kostantina (Deana) Hatzisevastos v Iron Mountain Pty Ltd [2015] FWC 770 (U2014/9468) SENIOR DEPUTY PRESIDENT HAMBERGER. SYDNEY, 4 MARCH 2015.***

And

> *"The respondent was well within its rights to consider any breach of its Code of Ethics and related policies as a serious matter. The applicant breached the company's gift policies not once but twice. Nor were they minor or technical breaches. She had no reason to plead ignorance of those policies. She had received training in them. The training was well written and was designed to leave employees no doubt about their obligations. The applicant's sales record is of limited relevance - she was dismissed for misconduct - not poor performance. I do not consider any of the other factors referred to by the applicant as in any way outweighing the seriousness of her misconduct.*

Weekend choofer fails on appeal attempt – discussion on the absence of legal standard for marijuana impairment[3]

I initially reported the original decision in Edition 9 (25/10/14) where the applicant's dismissal arose from a drug and alcohol test at work which showed that he had tested positive for cannabinoids at a level of 112µg/L, which was in excess of the permitted threshold of 15µg/L. In summary, the Vice President found that there was a valid reason for Mr Owen's dismissal, that he was accorded procedural fairness, and that his dismissal was not harsh, unjust or unreasonable, and therefore dismissed his application.

The FB, in rejecting the application for appeal, considered:

> *"As the Vice President correctly found, the issue in this case was not Mr Sharp's "out of hours" conduct in smoking cannabis, but rather that he attended for work (which involved the performance of SSAA) with a level of cannabinoids that was above (and very significantly above) the permitted threshold. That was "at work" conduct. Undoubtedly from Mr Sharp's perspective it seems harsh that he was dismissed as a result of this in circumstances where he did not consider himself to have been impaired or to have represented a risk to anyone's safety. However, a critical consideration in assessing whether a dismissal in these types of circumstances was unfair is the fact that* ***there is currently no direct scientific test for impairment arising from the use of cannabis*** *(my emphasis).*
>
> *"Apart from reliance upon the employee's own explanation about the matter, which will probably not be verifiable, the employer will therefore not be in a position properly to assess whether the employee is impaired as a result of cannabis use and therefore represents a threat to safety. For that reason, employer policies which provide for disciplinary action including dismissal where an employee tests positive for cannabis may, at least in the context of safety-critical work, be adjudged to be lawful and reasonable. Likewise, depending on all the circumstances, it may be reasonably open to find that a dismissal effected pursuant to such a policy was not unfair."*

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[3] Owen Sharp v BCS Infrastructure Support Pty Limited (C2014/7029). VICE PRESIDENT HATCHER. SENIOR DEPUTY PRESIDENT HAMBERGER. COMMISSIONER ROBERTS. SYDNEY, 27 FEBRUARY 2015 *Appeal against decision* [2014] FWC 7310 *and Order [*PR556674*] of Vice President Catanzariti at Sydney on 15 October 2014 in matter number U2014/634.*

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It started with a cake and ended in dismissal[4]

The applicant was employed as a chef at its Davoren Park aged care facility. He was dismissed after an allegation of serious misconduct.

The applicant, presented to two residents a birthday cake that he agrees was substandard and should not have been presented.

A Personal Care Worker, complained about the presentation of the cake to the residents by lodging a written complaint form. Standard procedure was for the form to go to the Facility Manager, which it did. Amongst Ms Behan's feedback was that the cake was "yuk" and "discusting" (sic).

It would appear that the applicant took umbrage to the complaint and began giving the PCA a hard time. The PCA subsequently complained to management as she felt quite intimidated by the applicant. The matter was investigated by an independent person.

The applicant was advised on the investigation in writing and warned not to approach the PCA in question. Despite this warning he did so and was therefore dismissed due to this breach.

As with these matters there was contradictory evidence to which the Commissioner stated:

> *"Having been dismissed for misconduct, the Commission is first required to find **whether on the balance of probabilities** (my emphasis) the alleged misconduct actually occurred. In doing so, it is necessary for the Commission to take into account the need to be properly satisfied of the proofs of the conduct; without applying a standard of proof higher than the balance of probabilities. The Commission will also take into account the need for honesty on the part of the Applicant during the course of an investigation."*

The commissioner subsequently found:

"I am satisfied that, on the balance of probabilities, the misconduct related in the termination letter of 15 August 2014 took place and that it was sufficiently serious for dismissal. Accordingly I find that Aboriginal Elders Village had a valid reason for Mr Longford's dismissal related to his conduct."

Until next time…

Greg Reiffel
Principal Consultant

4 Michael Longford v Aboriginal Elders & Community Care Services Inc T/A Aboriginal Elders Village[2015] FWC 1480. (U2014/8955). COMMISSIONER WILSON. MELBOURNE, 3 MARCH 2015